Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

(24) (23)

Nos. 91-744 and 91-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Petitioners,

v.

ROBERT P. CASEY, *et al.*,

Respondents.

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v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF ROBERT P. CASEY, *et al.*

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. The movement is led, and its policies determined, by a group of prominent senior Orthodox rabbinical figures respected broadly as outstanding scholars of Jewish law and decisors of Jewish policy.

Informed by classical Jewish tradition which teaches that all human life is sacred, and possessed of the firm view that laws which undermine the sanctity of human life send a message that is profoundly dangerous for all of society, Agudath Israel speaks out frequently on a broad panoply of public policy issues that arise at the outset and conclusion of the human life cycle. Consistent with this approach, Agudath Israel has long opposed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), that the right to abortion protected under the Fourteenth Amendment's personal liberty/due process clause is uniformly "fundamental," and thereby protected against governmental abridgment absent a compelling state interest.

At the same time, as a representative of a religious minority community whose constituents rely heavily on the religious freedoms guaranteed under the First Amendment, Agudath Israel is a staunch advocate of religious liberty for all Americans. Here again, the issue of abortion figures prominently on Agudath Israel's agenda. Jewish tradition accords fetal life significant protection. As a general rule, Judaism rejects the notion that termination of pregnancy, even prior to fetal viability, is properly a matter of free maternal choice. Nonetheless, in certain exceptional cases, Jewish law may authorize abortion -- indeed, may require abortion as a matter of religious obligation. Accordingly, in conjunction with its opposition to legalized abortion on demand, Agudath Israel has supported a woman's legal right to abortion where she seeks the abortion as an expression of her religious faith.

Agudath Israel's interest herein relates primarily to what Judge Alito referred to below as "the crux of this case . . . the identification of the constitutional standard that the lower courts must now apply in cases involving laws regulating abortion." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 720 (3rd Cir. 1991) (Alito, J., concurring in part and dissenting in part). Agudath Israel believes the time is ripe for this Court expressly to discard the "fundamental right/compelling state interest" framework of *Roe v. Wade*, and to adopt in its place a jurisprudential framework that is at once protective of human fetal life yet solicitous of religious freedom. It is the objective of this *amicus* brief to attempt to outline such a framework.

Through their respective counsel, the parties have consented to the appearance of Agudath Israel as *amicus curiae*.

SUMMARY OF ARGUMENT

The central premise of Agudath Israel's argument is that characterization of the right to abortion as "fundamental" need not be a matter of *always* or *never*.

I. In most cases, where the sole constitutional source of the claimed right to abortion is the personal liberty/privacy right developed in *Roe v. Wade*, 410 U.S. at 152-53, the right to abortion should not be accorded the status of a "fundamental" right. Accordingly, legislative measures designed to restrict the

availability of abortion -- such as the Pennsylvania statutes at issue here -- should generally be upheld even in the absence of any compelling state interest, so long as there is a rational basis for the legislation.

II. There are times, though, when a woman's claimed right to an abortion is grounded not only in her personal liberty/privacy right, but also in another constitutionally protected interest. For example, when abortion is an expression of the mother's religious beliefs, her constitutional claim is enhanced by her First Amendment right freely to exercise her religion. In such cases -- presenting the type of favored "hybrid situation" this Court acknowledged in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990) -- access to abortion is indeed a right that is "fundamental," and may not be abridged absent a countervailing compelling state interest.

ARGUMENT

THE RIGHT TO ABORTION SHOULD NOT UNIVERSALLY BE DEEMED "FUNDAMENTAL"; ITS CHARACTERIZATION AS SUCH SHOULD DEPEND ON THE CIRCUMSTANCES SURROUNDING THE CLAIMED RIGHT

The court below prefaced its review of the Pennsylvania statutes at issue with the observation that "[t]he choice of a standard of review in a substantive due process case turns on whether a 'fundamental right' is implicated." 947 F.2d at 688. The court then surveyed this Court's abortion decisions and discov-

ered in the opinions of the various Justices three divergent approaches to the "fundamental right" debate:

(1) at one extreme, the view of the majority in *Roe v. Wade*, most recently expressed in Justice Marshall's dissenting opinion in *Hodgson v. Minnesota*, --- U.S. ---, 110 S.Ct. 2926, 2952 (1990) (Marshall, J., dissenting), that abortion is always a "fundamental" right, and that it accordingly can never be burdened absent a compelling governmental interest (947 F.2d at 689);

(2) at the other extreme, the view of the dissenting Justices in *Roe v. Wade*, that abortion may be burdened even if government has only a rational basis to do so, on the theory that abortion is merely "a species of 'liberty' that is subject to the general protections of the Due Process Clause," *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (White, J., dissenting), but not a "fundamental" right (947 F.2d at 689);

(3) the "middle ground" first articulated by Justice O'Connor in her dissenting opinion in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461-65 (1983) (O'Connor, J., dissenting), and reiterated most recently in Justice O'Connor's concurring opinion in *Hodgson, supra*, 110 S.Ct. at 2949-50, that the right to abortion is a "limited fundamental right" which may not be "unduly burdened" absent a compelling government interest, but may be burdened

less severely merely upon a rational basis (947 F.2d at 689-91).

Based on its reading of this Court's more recent abortion decisions, the court below concluded that "Justice O'Connor's undue burden standard is the law of the land," 947 F.2d at 698[1]; and accordingly proceeded to review the Pennsylvania statutes at issue under the "undue burden" standard. With but one exception, the court determined that none of the challenged statutes imposed an undue burden on abortion; that Pennsylvania had a rational basis for each of the laws; and that therefore the laws were constitutionally acceptable. The one exception was the law relating to spousal notice, which in the view of the court's majority did impose an undue burden on the right to abortion; was not justified by a compelling

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[1] Justice Rehnquist's plurality opinion in *Webster v. Reproduction Health Services*, 492 U.S. 490 (1989), took pains to avoid embracing any one specific approach to the status of abortion as a "fundamental" right. ("The experience of the Court in applying *Roe v. Wade* in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . ., a 'limited fundamental constitutional right' . . ., or a liberty interest protected by the Due Process Clause . . ." 492 U.S. at 520.) As the decision of the court below demonstrates, however, the "abstract differences" between the various formulations have concrete applications; lower courts called upon to evaluate the constitutionality of abortion-related legislation require clear guidance on what the court below characterized as "[t]he threshold question" of the appropriate standard of review. 947 F.2d at 687.

state interest; and was accordingly struck down as unconstitutional. 947 F.2d at 698-719.

It is noteworthy that under all three of the approaches identified in the court below, a woman's motivation in seeking abortion is entirely irrelevant to the determination of whether the right is "fundamental." In making that determination, it would seem to matter not a whit under any of the three models whether the abortion is being done to save the mother's life, to preserve her health, to advance her career, to avoid the stigma of single motherhood, to preserve her personal independence, to avoid having a baby of a particular gender, or for any other "convenience, whim or caprice of the putative mother" (*Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting)). Even under the more flexible "middle ground" approach attributed to Justice O'Connor, the variable factor that will determine whether to apply strict scrutiny or rational basis analysis relates to the nature and extent of the burden imposed by government, not the circumstances surrounding the woman's desire to terminate her pregnancy.

As detailed below, Agudath Israel submits that the woman's motivation in seeking abortion ought not be irrelevant to the "fundamental right" determination. Analysis of the Court's definition of rights that are "fundamental" should lead to the conclusion that most abortions do not fit that definition, but that some most assuredly do.

I.

In Typical Cases, Where the Sole Constitutional Source of the Claimed Abortion Right Is the Personal Liberty/Privacy Interest, Abortion Should No Longer Be Deemed a "Fundamental" Constitutional Right

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court had occasion to consider the factors that go into the making of a right or liberty that is "fundamental":

> "Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326, (1937), it was said that this category includes those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are 'deeply rooted in this Nation's history and tradition.' *Id.*, at 503 (POWELL, J.). See also *Griswold v. Connecticut*, 381 U.S., at 506."

Id. at 191-92. Applying these formulations to the asserted right of homosexuals to engage in acts of consensual sodomy, the Court in *Bowers* noted that proscriptions against such acts had strong historical roots, both from ancient times and in the laws of the various states for most of this nation's history. "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

The same can be said with respect to most cases of abortion: It is facetious, at best, to claim that abortions of convenience are deeply rooted in our history and tradition, or that they are a necessary component of ordered liberty. We need not dwell on the point, since the Court has heard it made many times over in the years since *Roe*, both from within and without. Suffice it for us to reiterate the persuasive analysis offered by Justice White, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 793-94 (1986):

> "If the woman's liberty to choose an abortion is fundamental, then, it is not because any of our precedents (aside from *Roe* itself) commands or justifies that result; it can only be because protection for this unique choice is itself 'implicit in the concept of ordered liberty' or, perhaps, 'deeply rooted in this Nation's history and tradition.' It seems clear to me that it is neither. The Court's opinion in *Roe* itself convincingly

> refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental."

Indeed, as Professor Laurence H. Tribe (himself an outspoken critic of the *Bowers* decision) has noted (Tribe, *American Constitutional Law* at 1430 (2d Ed. 1988)), there is a factor present in the abortion context that renders abortion even less deserving of "fundamental rights" protection than consensual sodomy: the irrevocable harm done to the fetus. Whereas consensual acts of sodomy, in theory at least, are performed with the full knowledge and acquiescence of the parties involved, abortion is not. "The pregnant woman cannot be isolated in her privacy," observed the Court in *Roe*, 410 U.S. at 159, a factor that led Justice White to argue -- correctly, in our view -- that the abortion decision "must be recognized as *sui generis*, different in kind from the others

that the Court has protected under the rubric of personal or family privacy or autonomy." *Thornburgh, supra*, 476 U.S. at 792 (White, J., dissenting; footnote omitted).

In typical cases, therefore, where a woman's claimed constitutional right to an abortion is grounded solely in her personal liberty/due process rights, the analysis in *Bowers* leads *a fortiori* to the conclusion that -- contrary to *Roe v. Wade* -- the right ought not be deemed "fundamental." Accordingly, states that seek to restrict or prohibit abortions in those cases should be permitted to do so on any rational basis, even in the absence of a compelling state interest. Applying that analysis to the instant case, the statutes at issue should be upheld; Pennsylvania surely had a rational basis upon which to enact these laws -- including the law governing spousal notice -- and in a facial challenge against their validity no more than a rational basis need be shown.

II.

In Extraordinary Cases, Where the Constitutional Source of the Claimed Abortion Right Includes a Source In Addition to the Personal Liberty/Privacy Interest -- For Example, Cases Where Abortion Is an Expression of Free Exercise of Religion -- Abortion Should Remain a "Fundamental" Constitutional Right

The conclusion that *most* abortions are not expressions of a "fundamental" right does not mean that *all* abortions are not expressions of a "fundamen-

tal" right. Some are -- and should expressly be recognized as such.

Consider, for example, the case of a pregnant woman whose clergyman advises her to procure an abortion as a matter of religious obligation -- as in fact a rabbi may advise a Jewish woman under certain extraordinary circumstances.[2] When that woman seeks an abortion, her claim is constitutionally grounded not only in her general liberty/privacy interest, but also in her First Amendment right freely to exercise her religion. Under such circumstances, the woman's claim to abortion deserves enhanced constitutional status.

Free exercise rights are indisputably "fundamental." *E.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Government may not burden free religious exercise unless it can show that "an inroad on religious liberty . . . is the least restrictive means of achieving some compelling state interest," *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718 (1981); or, as the *Yoder* Court put it, "only those interests of the highest order and those not otherwise served can overbalance

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[2] A comprehensive discussion of the Jewish attitude toward abortion, including the circumstances under which abortion may be authorized or compelled under Jewish law, is beyond the scope of this brief. A scholarly analysis of this complex subject appears in Rabbi J. David Bleich's *Abortion in Halakhic Literature*, reprinted in Volume 1 of the author's *Contemporary Halakhic Problems*, at 325 (Ktav/Yeshiva University Press 1977).

legitimate claims to the free exercise of religion." 406 U.S. at 215. Although the Court has not had occasion to consider the applicability of its free exercise jurisprudence to the abortion context -- *Harris v. McRae*, 448 U.S. 297, 320-21 (1980), the one case where the issue was raised, was dismissed on this point because the plaintiffs lacked free exercise standing -- there is every reason to emphasize both its relevance and importance in any post-*Roe* regulatory framework.

It is true that in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), five Justices of the Court voted to curtail considerably the scope of the Free Exercise Clause, holding that free exercise protection does not extend to laws of general applicability that burden religious practice only incidentally.[3] Nonetheless, even the *Smith* majority acknowledged that "the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . [where the free exercise claim is advanced] in conjunction with other constitutional protections . . ." 494 U.S. at 881. Such a "hybrid situation," *id.* at 882, which under *Smith* does merit heightened constitutional protection, would appear to be present when a woman seeks abortion as an expression of her religious beliefs; her claim in such cases would be predicated on the twin constitutional bases of liberty/-privacy and free exercise.

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[3] For the record, Agudath Israel believes the *Smith* Court's majority erred in its analysis of the Free Exercise clause.

The interplay between abortion and free exercise of religion is by no means a trivial issue. Currently pending in the House of Representatives are two bills designed to address the Court's ruling in the *Smith* case: H.R. 2797, the "Religious Freedom Restoration Act," and H.R. 4040, the "Religious Freedom Act." Both bills would make it clear that the protections of free religious exercise apply even in cases where a government action burdens religious practice only incidentally; and that only a compelling governmental interest, applied through the least restrictive means, can overcome an assertion of free exercise of religion. The major difference between the two bills is that whereas H.R. 2797 is neutral on its face and in no way limits the types of claims that may be entitled to the bill's protections, H.R. 4040 expressly excludes several substantive areas from the scope of the bill's protections -- including specifically the area of abortion. Thus, section 3(c)(2) of H.R. 4040 provides: "Nothing in this Act shall be construed to authorize a cause of action by any person to challenge . . . (C) any limitation or restriction on abortion, on access to abortion services or on abortion funding."

Putting aside for now the legal question of whether the constitution would permit H.R. 4040's exclusion of abortion from the scope of the bill's protection,[4] the ongoing debate in Congress over H.R. 2797 and H.R. 4040 makes it abundantly clear that

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[4] Agudath Israel has argued in a February 14, 1992 memorandum to H.R. 4040's lead sponsor, Congressman Christopher H. Smith, that in fact his bill would violate both the Free Exercise and Establishment Clauses.

religiously based claims to abortion would encounter considerable resistance in the political arena. It is for this reason that Agudath Israel feels so strongly about the importance of the Court using the earliest possible opportunity to state clearly that the right to abortion is constitutionally "fundamental" when it is asserted in the context of a woman's exercise of her sincerely held religious beliefs. This case affords the Court occasion to do so -- through the enunciation of a standard that would evaluate the circumstances surrounding a woman's claim to abortion in determining whether the claim is entitled to protection as a "fundamental" constitutional right.[5]

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[5] There are other contexts in which abortion may rise to the level of a "fundamental" constitutional right. The most obvious example is where the pregnancy threatens the mother's life. *Roe v. Wade* itself makes clear that abortions in cases involving danger to the mother's life are entitled to enhanced constitutional protection. In those cases, states must permit abortions even *subsequent* to fetal viability. 410 U.S. at 163-64. *See Thornburgh, supra*, 476 U.S. at 768-69; *Colautti v. Franklin*, 439 U.S. 379, 397-401 (1979). Reconsideration of the general rule of *Roe* that all abortions are "fundamental" rights does not necessarily, and should not, vitiate the enhanced constitutional status of at least those abortions performed to preserve the mother's life. Such abortions, long permitted under the laws of the various states (see *Roe, supra*, 410 U.S. at 138-40), are "deeply rooted in this Nation's history and tradition" and, we submit, "implicit in the concept of ordered liberty." Moreover, for a state to deprive a woman the right to abortion even where her life is in danger is not merely to deprive her of some vague sense of a personal liberty "interest"; it is literally to deprive her of the "*life*" the Fourteenth Amendment expressly protects. Surely abortion in such cases is a right that is "fundamental."

CONCLUSION

For the reasons stated above, *amicus curiae* Agudath Israel of America respectfully submits that *Roe v. Wade*'s holding that all abortions are expressions of a "fundamental" constitutional right should be reconsidered and expressly overruled; and that in its place the Court should adopt a framework whereby abortion claims would or would not be accorded "fundamental right" status depending upon the circumstances surrounding their assertion -- a framework under which both a woman's religious freedom and a fetus' "right to life" would be accorded significant legal protection.

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April 6, 1992